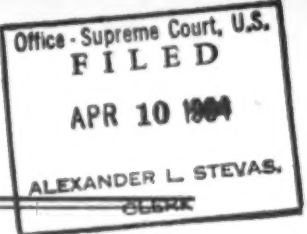


No. 83-1169



In the Supreme Court of the United States

OCTOBER TERM, 1983

STEVEN MARK HOLLOMAN, ET AL., PETITIONERS

v.

WILLIAM P. CLARK, SECRETARY OF THE INTERIOR, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT*

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the United States is answerable in damages for the value of Indian tribal privileges lost by petitioners as a result of tribal action taken on the basis of mistaken information, communicated by Department of Interior officials to tribal officials, as to petitioners' eligibility for membership in the tribe.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C1-C10) is reported at 708 F.2d 1399. The order of the court of appeals upon denying rehearing (Pet. App. D1-D4) is unreported. The district court's findings of fact and conclusions of law (Pet. App. A1-A25) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 1983. A petition for rehearing was denied on October 18, 1983 (see Pet. App. D1-D2). The petition for a writ of certiorari was filed on January 16, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners filed this action in the United States District Court for the Eastern District of Washington in 1979. Petitioners claimed that respondents, the Secretary of the

Interior and two named officials of the Department of the Interior sued in their respective official capacities, the Department itself and its Bureau of Indian Affairs (BIA), had erroneously denied them their per capita share of sums due to members of the Colville Indian Tribe. Jurisdiction of the action was alleged to lie under 5 U.S.C. 702 and 28 U.S.C. 1331, 1343(4), 1361, 2201 and 2202, and the Fifth Amendment to the Constitution (E.R. 2).¹ In 1980, petitioners amended their complaint to seek money damages for their loss of certain tribal benefits allegedly attributable to the action of respondents (E.R. 16). At this time two additional bases for jurisdiction were asserted, 25 U.S.C. 163 and sections of the Indian Reorganization Act, 25 U.S.C. 476 *et seq.* (E.R. 14).

The controversy that gave rise to this litigation stems from uncertainty as to the blood degrees of the petitioners. Under the constitution of the Colville Tribe, effective July 1, 1959, no person could be admitted to tribal membership unless he or she possessed at least one-quarter Colville blood (Pet. App. A3-A4). Petitioners, however, share a common ancestor whose own blood degree has been the subject of uncertainty, creating a basis for dispute as to their own eligibility for tribal enrollment. Although the Colville Tribe and the BIA were apparently aware of the underlying uncertainty, petitioners were enrolled in the Colville Tribe in 1966.

In 1969, however, the enrollment application of a distant relative of the petitioners, who shared with them the ancestor of uncertain lineage previously mentioned, drew the BIA's attention to the matter. The BIA responded by adjusting the blood degree of petitioners' common ancestor downward, in conformity with the application of petitioners' relative. As a consequence, petitioners' own blood

¹"E.R." denotes the Excerpt of Clerk's Record filed in the court of appeals.

degrees were recomputed at a level too attenuated to support tribal enrollment. Pet. App. A6. By a September 23, 1971 letter to the chairman of the Colville Business Council, the BIA instructed the Tribe to notify the heads of any affected families of these developments. But no action affecting petitioners' tribal enrollment was taken by the Tribe at that time. Pet. App. C2-C3.

In 1974, however, the BIA advised the Colville Tribe that, based on petitioners' recomputed blood degrees, they were not eligible for "membership enrollment with the Colville Tribes," stating that "action should be taken by the Business Council to remove their names from the roll as they are not eligible for further payments made to members of the tribe" (Pltf. Exh. 12). The BIA's letter stated further that procedures used in the past in similar situations should be followed when action was taken to disenroll petitioners (Pltf. Ex. 12; Pet. App. A10-A11). No notice of the BIA's actions correcting petitioners' ancestor's blood degree was given to petitioners, nor did the Tribe or BIA notify petitioners that there was a problem concerning their enrollment (*id.* at C3). But petitioners ceased receiving their per capita share payments from the BIA as of March 31, 1974 (*id.* at A11, C3).

Pursuant to a written notice dated March 10, 1977, a hearing respecting the eligibility of the petitioners for enrollment in the Tribe was held before the Colville Tribal Enrollment Committee. An attorney appeared on behalf of the petitioners and presented evidence in support of their enrollment. On March 20, 1978, the Business Council of the Tribe formally determined that the four petitioners were not eligible for enrollment because they lacked the required one-quarter Colville blood degree. The disenrollment resolutions of the Tribe were forwarded to the BIA. Before any further action could be taken, petitioners filed this action. Pet. App. A14-A15, C3.

During the course of the proceedings, the BIA discovered entirely new evidence that established that an ancestor of the petitioners different from the one whose blood degree had been debated had a higher quantum of Colville blood than previously had been thought. In light of this new evidence, the Tribe reconsidered its prior disenrollment action, and determined that petitioners were entitled to enrollment and payment of all withheld per capita payments. Pet. App. C4. The district court, however, decided that the re-enrollment of the petitioners by the Tribe did not render this action against federal officials moot (*id.* at A25).

2. The district court² concluded that 28 U.S.C. 1331 provided a jurisdictional basis for the action and that the Tribe was not an indispensable party (Pet. App. A16). The court held that the BIA had denied due process of law to petitioners by its failure to provide notice to them prior to terminating their per capita payments (*id.* at A16-A17) and had violated 25 U.S.C. 163 and its own established procedures in correcting the blood degrees of petitioners (Pet. App. A17-A23). The district court held the respondents liable for damages in the aggregate amount of \$105,000, plus interest, for petitioners' "loss of tribal identity and the benefits attendant to being a member of the [Colville] tribe" including fishing, hunting and woodcutting rights, tribal employment preferences, tribal grant and loan programs and cultural benefits of tribal membership (*id.* at A14, A24, B2-B3). The court also ordered restoration of withheld per capita payments (*id.* at B3).

Because of the discovery of the new information that validated petitioners' claim of eligibility for enrollment and the Colville Tribe's rescission of its disenrollment resolutions, the BIA released the per capita payments that had

²The action was tried to a United States Magistrate by consent of the parties (see Pet. App. A1).

been withheld from petitioners, satisfying that portion of the district court's judgment (Pet. App. C5). But the respondents appealed from the award of money damages based upon the petitioners' loss of the other benefits of tribal membership.

3. The court of appeals reversed the challenged award of damages (Pet. App. C1-C10). The court concluded (*id.* at C5-C9) that petitioners' claim for these money damages did not rest upon "any federal statute [that] 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained' " (*id.* at C5, quoting *United States v. Testan*, 424 U.S. 392, 400 (1976), quoting *Eastport Steamship Corp. v. United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967)). The court observed that, contrary to petitioners' contentions, 28 U.S.C. 1331 does not authorize recovery of damages against the United States (Pet. App. C6). Petitioners' reliance upon *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), was misplaced, the court observed, because this is an action against agencies of the United States and officers sued in their official capacities, rather than a damages action against individuals (Pet. App. C6-C7). Nor could the damage claim be entertained under the Federal Tort Claims Act because petitioners had not filed the required administrative claim (Pet. App. C7-C8). Finally the court of appeals held that the particular damages in dispute were not recoverable on the theory that the government had breached a fiduciary duty governing its management of Indian property. Observing that the government had restored the per capita payments that had been withheld from petitioners, payment of which was subject to an obligation of trust, the

court of appeals distinguished its own decision in *Moose v. United States*, 674 F.2d 1277 (1982). Pet. App. C8-C9.³

Petitioners sought rehearing, asserting that this Court's intervening decision in *United States v. Mitchell*, No. 81-1748 (June 27, 1983) (*Mitchell II*), supported their damages claim. The court of appeals denied the petition for rehearing in a brief supplemental order (Pet. App. D1-D2). The court recognized that *Mitchell II* makes clear that "the Tucker Act, 28 U.S.C. § 1491, itself constitutes a waiver of sovereign immunity for specified types of claims" (Pet. App. D1) and that "among those claims are breaches of the United States' fiduciary duty toward Indians" (*id.* at D2). But the court of appeals explained that the teaching of *Mitchell II*, prefigured in its own decision in *Moose* (see note 3, *supra*), did not alter the fact that petitioners had not argued in a timely manner that damages for their loss of tribal membership were traceable to any breach of fiduciary duty. "[I]n the exercise of * * * discretion" the court adhered to its decision to decline to address the petitioners' tardily advanced theory (Pet. App. D2).⁴

ARGUMENT

Petitioners' argument that the court of appeals' decision is inconsistent with this Court's decision in *Mitchell II* rests upon a misapprehension as to the basis for the decision below.

³In *Moose* the court of appeals had held that damages are recoverable from the United States for mistakes in the disbursement of a tribal judgment fund. Because petitioners had not claimed, prior to oral argument, that their damages for loss of tribal status were proximately traceable to a breach of fiduciary duty, the court of appeals declined to consider that argument (Pet. App. C9).

⁴Judge Fletcher dissented from the denial of rehearing (Pet. App. D3-D4), suggesting that the court should exercise its discretion to entertain petitioners' new contentions, and, without reaching the merits, remand the case to the district court with instructions to transfer it to the Claims Court, which could pass on the applicability of *Mitchell II* in the first instance.

1. In *Mitchell II* this Court made clear that the Tucker Act, 28 U.S.C. 1491 and 1346(a)(2), waives the sovereign immunity of the United States as to the classes of claims described in the Act, including those "founded either upon the Consitution, or any Act of Congress, or any regulation of an executive department or upon any express or implied contract with the United States" (28 U.S.C 1491(a)(1)). Slip op. 6-10. The Court thus disavowed certain dicta in *United States v. Testan*, 424 U.S. 392, 398, 400 (1976), and *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (*Mitchell I*), that suggested that the Tucker Act does not waive sovereign immunity (slip op. 10). At the same time, however, the Court expressly reaffirmed that, as it had *held* in *Mitchell I* and *Testan*

[T]he Tucker Act " 'does not create any substantive right enforceable against the United States for money damages.' " *United States v. Mitchell*, 445 U.S., at 538, quoting *United States v. Testan*, 424 U.S., at 398. A substantive right must be found in some other source of law, such as "the Constitution, or any Act of Congress, or any regulation of an executive department." 28 U.S.C. § 1491. Not every claim invoking the Constitution, a federal statute, or a regulation is cognizable under the Tucker Act. The claim must be one for money damages against the United States, see *United States v. King*, 395 U.S. 1, 2-3 (1969), and the claimant must demonstrate that the source of substantive law he relies upon " 'can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.' " *United States v. Testan*, 424 U.S., at 400, quoting *Eastport S.S. Corp. v. United States*, 178 Ct. Cl. 599, 607, 372 F.2d 1002, 1009 (1967).

Mitchell II, slip op. 10-11 (emphasis added; footnotes omitted).

In light of the foregoing statement of the applicable principles, petitioners' assertion (Pet. 6-8) that the decision below conflicts with *Mitchell II* is frivolous. Although the court of appeals' opinion occasionally employs the imprecise sovereign immunity terminology derived from *Mitchell I* and *Testan* that was discarded in *Mitchell II*, see Pet. App. C2, C5, the standard employed by the court of appeals for determining whether petitioners' claim for damages could be maintained was precisely the one this Court has enunciated: whether the statutory predicate for the claim "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." Compare *Mitchell II*, slip op. 22 with Pet. App. C5 (each quoting *Testan*, 424 U.S. at 400, quoting *Eastport Steamship Corp.*, 372 F.2d at 1009). Thus, the Court's clarification, in *Mitchell II*, that the question whether a particular statute can support a claim for damages under the Tucker Act is not one of sovereign immunity in no respect calls in question the decision by the court of appeals in this case.⁵

2. a. Petitioners assert (Pet. 8-11) that 25 U.S.C. 162a and 163 impose fiduciary duties upon the United States with respect to Indian funds held by the United States and that damages are recoverable for the breach of such duties.⁶

⁵In *Mitchell II* the Court emphasized (slip op. 10) that its ruling did not "in any way question[] the result" in *Testan* or *Mitchell I*, which in no sense depended upon the use of the sovereign immunity terminology in those opinions. The decision below is similarly unaffected by *Mitchell II*.

⁶We assume that petitioners intend to invoke 25 U.S.C. 162a, rather than 25 U.S.C. 162(a). See Pet. App. E1-E3.

We note that petitioners apparently have abandoned any claim that damages are due for a denial of due process. The due process branch of the district court's decision apparently supported only the direction that withheld per capita payments be restored (see Pet. App. A16-A17). In any event, unlike the Just Compensation Clause, see *Jacobs v. United States*, 290 U.S. 13, 16 (1933), the Due Process Clause does not mandate

The fundamental flaw in petitioners' argument is that the court of appeals, relying on its own decision in *Moose v. United States*, 674 F.2d 1277, 1282-1283 (1982), which foreshadowed *Mitchell II* in this respect, agreed that "[i]n this case the government also held in trust the fund from which per capita and dividend payments were made subject to fiduciary duties established by [25 U.S.C.] 161a and 162a" (Pet. App. C9). And the court of appeals agreed that these provisions would ground an action to recover "per capita and dividend payments wrongfully withheld" (*ibid.*). But because those sums had been paid by the government and because it was not apparent that the separate items of damage claimed here were proximately traceable to the government's alleged breach of fiduciary duty, the court of appeals declined to uphold the damage award absent a timely argument by petitioners making the necessary connection (*ibid.*).⁷ *Mitchell II*, the court of appeals pointed out

the availability of a compensatory remedy. Accordingly, except perhaps to the extent that recovery is sought of sums "improperly exacted or retained" (*Testan*, 424 U.S. at 401), invocation of the Due Process Clause could not advance petitioners' cause. Of course, unlike the withheld per capita payments that have now been restored to petitioners, the particular damages in issue here could not by any stretch of the imagination be deemed compensation for monies wrongfully exacted or retained by the United States.

⁷Reliance upon 25 U.S.C. 163 does not advance petitioners' claim for damages for loss of benefits of tribal membership. That statute authorizes the Secretary to prepare a tribal membership roll to govern distribution of trust assets. See *Baclarelli v. Morton*, 481 F.2d 610, 612 (9th Cir. 1973). Nothing in Section 163 suggests that it makes the United States liable for the indirect effects of tribal decisions as to membership that do not involve distribution of trust property. Cf. *Sac and Fox Tribe v. Andrus*, 645 F.2d 858, 860 (10th Cir. 1981). (The Secretary of the Interior has advised us, we note, that the Tribal roll of the Colville Tribe was not prepared pursuant to 25 U.S.C. 163. A contrary stipulation entered by government counsel in district court was erroneous. Under the decision of the court of appeals it does not matter whether Section 163 is applicable or not.)

in denying rehearing (Pet. App. D2), made no material change in the applicable law in the Ninth Circuit and accordingly did not in any way excuse petitioners' failure to establish an essential predicate for their claim.⁸

b. Petitioners do not appear to challenge the court of appeals' conclusion (Pet. C9) that damages recoverable for breach of trust in the management of Indian funds are limited by a principle of proximate causation. That conclusion plainly is correct. In its decision in *Mitchell II*, subsequently affirmed by this Court, the former Court of Claims held that damages available for breach of trust are limited to "direct loss or diminution in value of [Indian] property (and its proceeds) due to mismanagement by federal officers." *Mitchell v. United States*, 664 F.2d 265, 273-274 (1981) (en banc). By contrast, "plaintiffs are not entitled to sue for other types of damages or compensation: indirect or consequential business, economic, or personal damages, * * * or personal, psychological, or social harm experienced by Indian owners * * *" (*ibid.*). See also *Duncan v. United States*, 667 F.2d 36, 46-49 (Ct. Cl. 1981), cert. denied, No. 81-1747 (July 6, 1983). No contrary authority is cited by petitioners and we are aware of none.

3. We note that, as petitioners concede (Pet. 8), they never pleaded the Tucker Act as a jurisdictional basis for this action. Indeed, in the court of appeals petitioners argued (Br. 14, 16) that the gravamen of their claim was that they had suffered a "constitutional tort" (see page 5,

⁸Accordingly, it simply is not correct to suggest that petitioners' failures of pleading and proof are attributable to a failure to anticipate *Mitchell II* and should be excused. Compare Pet. 11. We note, as well, that Judge Fletcher's dissent from the denial of rehearing does not suggest, as petitioners imply (Pet. 9), that the damages petitioners seek are properly recoverable. She merely suggested that the case be transferred to the Claims Court for a decision. See page 6 note 4, *supra*.

supra) and that this case accordingly was "exclude[d]" from the coverage of the Tucker Act (see 28 U.S.C. 1491(a)(1)) and that assertion of jurisdiction under that statute would be "improper." Even assuming that petitioners were free at the eleventh hour to reverse field, style their claim as one for breach of trust, and rely upon the Tucker Act,⁹ that claim must fail for the reason given by the court of appeals: no statute contemplates compensation for the class of injuries allegedly suffered here.¹⁰

*The court of appeals' decision does not rest upon any failure of pleading in these respects. See pages 5-6 & note 3, *supra*.

¹⁰Of course, if damages had been sought under the Tucker Act on a breach of trust theory, jurisdiction would lie only in the Claims Court, because, as Judge Fletcher recognized (Pet. App. D4), the amount of damages sought exceeds the monetary limit applicable to district court Tucker Act jurisdiction under 28 U.S.C. 1346(a)(2). Contrary to petitioners' contention (Pet. 12 n.4), *Rowe v. United States*, 633 F.2d 799 (9th Cir. 1980), cert. denied, 451 U.S. 970 (1981), does not suggest otherwise. There the court of appeals merely held that joinder of a claim for money damages in excess of \$10,000 with a claim for judicial review of administrative action did not strip the district court of jurisdiction over the non-damages claim. The court made clear "that such joinder does not give the district court jurisdiction over the claim for damages in excess of \$10,000" (633 F.2d at 802).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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